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April 29, 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 4(g) of the	)	
Cable Television Consumer Protection	)	MM Docket No. 93-8
Act of 1992	)	
	)	
Home Shopping Station Issues	)	

To: The Commission

REPLY COMMENTS

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SUMMARY

The Commission must focus on the two central issues in this proceeding:

- Whether the Communications Act permits the Commission to regulate the amount of commercial matter broadcast over the public's airwaves?

- Whether the Commission should find that broadcast stations which are predominantly devoted to the broadcast of commercial matter are not serving the public interest, convenience and necessity?

The Commission must answer both of these questions in the affirmative. In particular, it must reject the view advanced by home shopping and infomercial providers that the Commission may only regulate the tiny bit of their programming which is specifically designed to meet broadcasters' "public service" obligations.

Contrary to the belief of some of the commenters in this proceeding, the Commission has specific and general authority to find that stations predominantly devoted to home shopping programming are not operating in the public interest. In addition, nothing in the 1992 Cable Act or the Communications Act limits them to making this assessment only at renewal time. Conversely, Section 4(g) is quite clear in its command that the Commission cannot make this assessment with reference to prior decisions abolishing commercial guidelines or renewing home shopping stations.

The home shopping programmers' argument that any limitation on the amount of such programming will harm minority-owned stations must be viewed with skepticism. There are a number of positive steps the Commission can take to ease the transition from a predominance of home shopping programming specifically for minorities. Moreover, the Commission should examine what underlies the phenomenon of the financing of minority stations by the largest

home shopping network. These financing agreements typically require the licensee to delegate editorial control of their programming to the network as the price of going on the air. This delegation of control to a non-minority programmer which may be thousands of miles away calls into question whether these stations really accomplish the goals which the Commission's minority preference policies were intended to achieve.

The commenters' constitutional arguments are similarly flawed. To question Congress' authority to limit commercialization over the airwaves under Section 4(g) also calls into question the constitutionality of the Children's Television Act of 1990. Both laws are fully consistent with the First Amendment; and each is a permissible exercise of authority to restrict commercial speech. The recently decided Discovery Network case does not change this authority.

Finally, under Section 4(g), the Commission must take into account whether there are uses for the portion of the broadcast spectrum which are now being used predominantly for the broadcast of commercial matter that better serve the public interest. The inquiry is not limited only to whether other applicants wish to provide television service; governmental uses, emergency uses and uses by other technologies which promote commerce must also be considered.

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To: The Commission

REPLY COMMENTS

The Center for the Study of Commercialism (CSC) respectfully submits these reply comments in response to various comments filed in the above matter.

CSC reemphasizes that the Commission must not lose sight of the issues which are at the heart of this proceeding. Plainly stated, those issues are:

- Whether the Communications Act permits the Commission to regulate the amount of commercial matter broadcast over the public's airwaves?

and

- Whether the Commission should find that broadcast stations which are predominantly devoted to the broadcast of commercial matter are <u>not</u> serving the public interest, convenience and necessity?

CSC submits that the Commission must answer both of these questions in the affirmative. In particular, CSC calls on the Commission to reject the view advanced by home shopping and infomercial providers that the Commission's regulatory grasp <u>is and should be</u> limited to that tiny fraction of broadcasters' programming which is specifically designed to meet

broadcasters' "public service" obligations as delineated under 47 CFR §73.3526(a)(8).[1]

The resolution of these two core issues will also aid the Commission in addressing the concerns raised in the comments filed in this proceeding. CSC addresses several of these concerns below.

I. THE COMMISSION HAS SPECIFIC AND GENERAL AUTHORITY TO FIND THAT STATIONS PREDOMINANTLY DEVOTED TO HOME SHOPPING ARE NOT OPERATING IN THE PUBLIC INTEREST.

CSC has urged the Commission to rule definitively that stations predominantly devoted to home shopping will not be considered to be operating in the public interest, and to address this issue comprehensively, not just in the context of whether such stations should be denied must carry status.

Time Warner Entertainment Company asserts that the Commission has no authority under Section 4(g) to do anything more than declare that stations predominantly devoted to home shopping are eligible or ineligible for must carry privileges. Time Warner Comments at 7. Similarly, other commenters argue that the Commission cannot find that stations predominantly devoted to home shopping, as a class, do not serve the public interest. E.g., KPST-TV Comments at 6-10; HSN Comments at 11.

The Commission need not even look to Section 4(g) to find authority to so rule. No one can dispute that the Commission has broad and independent discretion under the Communications Act to determine what is and is not in the public interest. It may make that determination in a general policy statement, a rulemaking, or in a specific adjudicatory matter, such as

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[1]Under this section, television broadcast stations are required to maintain and file quarterly issue/programs lists.

a license renewal. The Commission has, in the past, enforced limits on commercialization in individual adjudications and by means of generalized commercial guidelines for broadcast licensees. Radio Deregulation, 84 FCC2d 968, 1091-1092. While it lifted those restrictions in the 1980's, id; TV Deregulation, 98 FCC2d 1076 (1984), the Commission has never disclaimed its longstanding position that excessive commercialization is contrary to the public interest or denied that it has the power to restrict such practices. And, indeed, there is nothing in the Communications Act or the 1992 Cable Act which prohibits the Commission from adopting a policy that broadcast stations which are dominated by commercial matter are not operating in the public interest or which limits them to such a determination at renewal time.

The legislative history of Section 4(g) also provides support for CSC's position. The final and authoritative legislative statement on the scope of the Commission's authority under Section 4(g) is the October 2, 1992 colloquy between House Energy and Commerce Committee Chairman Dingell and Congressman Eckart.[2] In clarifying the scope of Section 4(g), the colloquy demonstrates that Congress intended the Commission to address the broader issue of whether licensing stations predominantly devoted to home shopping programming is in the public interest:

> First, let me ask my colleague if I am correct that the proceeding mandated under Section 614 (g)(2) of the bill reported by the conference requires the Federal Communica-

[2]Rep. Eckart was a sponsor of the amendment which, as modified in the conference became Section 4(g). Chairman Dingell was the Chair of the Conference and Rep. Eckart was a Conferee. The purpose of the colloquy was to "clarify the meaning of the bill's provisions on home shopping stations" and "correct the misimpression created by written statements introduced in the record by Messrs. MARKEY and LENT during the debate." 138 Cong. Rec. E2908 (October 2, 1993) (statement of Rep. Eckart). Rep. Lent was not a conferee. The Markey and Lent statements are found at 138 Cong. Rec. H8683 (Sept. 17, 1992) (statements of Rep. Lent and Rep. Markey).

> tions Commission to conduct a de novo review of the overall regulatory treatment of stations that are predominantly utilized for sales presentations or program-length commercials, notwithstanding prior proceedings the FCC has conducted which may have permitted or had the effect of encouraging such stations' practices.
>
> Second, am I correct in the view that the Commission's proceeding should consider...whether it should take steps to prohibit, limit or discourage such activities, and whether prior agency decisions and policies should be revised in light of this new statutory mandate.
>
> Finally, I ask my distinguished colleague if I am correct that the Commission proceeding required by Section 614(g)(2) requires the Commission to give particular attention to the renewal expectancy to be awarded to stations that are predominantly utilized for sales presentations or program-length commercials? While the bill states that such expectancy shall not be denied solely because of the use of such a format, the bill intends for the Commission to give specific consideration as to whether use of such a format should be considered as a major factor determining to award or deny a renewal expectancy.

138 Cong. Rec. E2908 (October 2, 1992) (Statement of Cong. Eckart) [Emphases added]. Chairman Dingell answered in the affirmative. 138 Cong. Rec. E2908 (October 2, 1992)(Statement of Congressman Dingell).

It is unmistakably clear, therefore, that nothing in the plain language or legislative history of the Act restricts the Commission's authority under Section 4(g) in the manner suggested by the commenters. Senator Breaux's statements, cited by the Association of Independent Television Stations (INTV) and the National Association of Broadcasters (NAB), are not to the contrary.[3] He was not a conferee; significantly, the Senate provision to which his comments were addressed did not include Section 4(g)(2)'s language requiring the Commis-

sion to determine whether stations predominantly devoted to home shopping programming are serving the public interest,[4] and therefore are of limited precedential value.[5]

II. BROADCAST STATIONS WHICH ARE PREDOMINANTLY DEVOTED TO THE BROADCAST OF COMMERCIAL MATTER DO NOT OPERATE IN THE PUBLIC INTEREST.

Supporters of stations primarily utilized for the transmission of home shopping programming argue that the Commission is precluded from basing its regulatory treatment on anything but the small amount of service programming which these stations provide. Conversely, they urge the Commission to ignore the fact that in many cases, a large proportion of their broadcast day is devoted to the broadcast of commercial matter. As support for this argument, in complete contravention of the plain language of Section 4(g), they ask the Commission to place primary reliance as controlling authority on prior Commission decisions eliminating commercialization guidelines and renewing licenses of some home shopping stations.

A. Minimal "Public Affairs" Programming Does Not Meet A Licensee's Obligation to Serve the Needs of Its Community of License.

As CSC anticipated in its comments, Home Shopping Network (HSN), Silver King Communications (SKC) and a number of licensees which offer programming predominantly

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[4]Senator Breaux's comments were addressed only to the following amendment he submitted

devoted to home shopping put forth a laundry list of the supposedly important issues they cover in the five or so minutes of "public affairs" programming each hour which is typical of most broadcast home shopping formats. E.g., SKC Comments at 25-28. They also highlight a small amount of other non-commercial matter which is occasionally broadcast, most typically in the early hours of Sunday morning. E.g., SKC Comments at 29-32; Jovon Broadcasting Comments at Exhibit 1, Section I.

CSC does not argue that some of this programming may, indeed, cover issues that are of import to the communities that these licensees serve and/or address important community needs.[6] But CSC submits that excessive commercialization, regardless of the quality or quantity of "service" programming, is not in the public interest, and the Commission can deter or restrict it. Id.[7] Serving informational needs is only part of what constitutes service in the public interest. Congress and the FCC have erected numerous other affirmative requirements, for example, carrying emergency announcements, political material and programming responsive to children's needs. And they have also defined service in the public interest in terms of limiting certain excesses - i.e., indecency in certain hours, news staging, phony contests and,

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[6]Although CSC believes this programming is irrelevant to the issue at hand, CSC is constrained to observe that this activity is not always as high minded or altruistic as is claimed. For example, in its attachments to its comments, KPST-TV includes thank-you letters which indicate that the station was paid by the producers of the programming to provide the programming. Letters of Charity Cultural Service Center and North East Medical Services, Appendix

significantly, excessive commercialization directed to children. Service in the public interest involves much more than programming to meet community problems, and the Commission surely has the power to address other aspects of broadcasters' performance.

B. Home Shopping Programming is Not an "Entertainment Format."

A number of the commenters refer to home shopping programming as an "entertainment format" in an attempt to equate it with other programming such as movies, game shows, or situation comedies. E.g., INTV Comments at 2; NAB Comments at 5; SKC Comments at 18-21. But the continuous sale of consumer goods is not comparable to programming having artistic, aesthetic or entertainment values, such as comedy, game shows, drama, sports, instructional or religious programming.

Unlike situation comedies, game shows or reruns of old movies, however, home shopping programming is commercial matter which can be limited, consistent with the Constitution, by the FCC.[8]

SKC and HSN argue, however, that any distinction between home shopping programming and other non-commercial programming must fail because

> all television is ultimately commercial in nature. Conventional advertiser-supported television stations also sell products, except that stations sell to an advertiser who then sells to viewers. The SKC's station programming simply eliminates the middle step of selling directly to advertisers.

SKC Comments at 18; See, HSN Comments at 27-28.

This argument ignores the plain language of Section 4(g), and thereby attempts to beg one of the central issues in this matter. What Congress was concerned about when it enacted

[8]As discussed in CSC's comments at 21-22, the Commission's renewal decisions highlight this distinction.

Section 4(g), and what the Commission must concern itself with, is the amount of commercial matter broadcast. It is irrelevant who is the speaker - the licensee or an advertiser. By its express terms, Section 4(g) is directed to stations "predominantly devoted to sales presentations," not to stations carrying advertising or to stations selling goods for their own benefit.

C. Prior Commission Decisions Are Irrelevant to This Proceeding.

Despite the unequivocal plain language of Section 4(g) which requires the Commission to undertake this proceeding "notwithstanding prior proceedings," and the Dingell-Eckart colloquy emphasizing that requirement, see pp. 3-4, supra, several of the commenters rely on the 1984 TV Deregulation decision, supra, and prior Commission decisions renewing the licenses of stations predominantly devoted to home shopping as confirmation that such stations operate in the public interest. E.g., SKC Comments at 10-18; NAB Comments at 6-9.

It may be true, as some commenters argue, that the Commission's deregulation decisions were intended to encourage "innovative" programming and "commercial flexibility." E.g., INTV Comments at 7; SKC Comments at 13-14. But that encouragement was based upon the critical assumption that marketplace forces would control overcommercialization. TV Deregulation, supra, at 1105. The Commission repeatedly promised to revisit its deregulation decisions in the event of marketplace failure. See, e.g., Radio Deregulation, supra, at 1006; CSC comments at 7-9. CSC submits that the growth of stations predominantly devoted to home shopping programming is proof that the marketplace has failed, and that the Commission must now keep its promise to revisit its decisions.

More importantly, as the Dingell-Eckart colloquy quoted above demonstrates, Congress believed that the marketplace had failed and, as a result, required the Commission to undertake

"a de novo review" of whether these stations are serving the public interest. 138 Cong. Rec. E2908 (Statement of Rep. Eckart).

III. A COMMISSION DECISION THAT STATIONS PREDOMINANTLY DEVOTED TO HOME SHOPPING ARE NOT OPERATING IN THE PUBLIC INTEREST NEED NOT HARM MINORITY-OWNED BROADCAST STATIONS.

Several commenters emphasize that home shopping programming is widely employed by minority-owned broadcast stations, many of which are marginal UHF stations. In addition, much is made of the fact that the largest home shopping network has provided financing employed to construct a number of these stations. HSN Comments at 16-20. The commenters then argue that a Commission decision finding that stations which are predominantly devoted to home shopping do not serve the public interest would threaten the vitality of these minority owned television stations. E.g., NABOB Comments at 4-5; NAB Comments at

network which may be thousands of miles away and which is not minority owned cannot possibly give minorities a "meaningful" presence in broadcasting or accomplish the goals which the FCC's minority ownership policies are intended to foster.[9]

B. The Financing Contracts Between HSN and Minority Licensees Improperly Delegate Programming Control to HSN.

HSN boasts that it has "funded the acquisition or construction of seven minority-owned television stations and has furthered the development of others through its affiliation agreements." HSN Comments at 17.

CSC urges the Commission to explore what underlies this phenomenon. HSN's willingness to finance new stations is based solely on the contractual power it retains to control their format. Bluntly put, a number of home shopping stations have been compelled to delegate editorial control of their programming as the price of going on the air. The effect of this process is to insure that these stations never have the opportunity to fulfill the dreams and hopes of those who have hoped that minority ownership would produce greater diversity in local programming and local self-expression.

It should not be surprising that the most vulnerable and weakest segment of the industry - minority entrepreneurs - is a principal target of these predatory practices. There is little

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[9]The Commission's policies to encourage minority ownership of broadcast stations were intended, in the words of Justice Brennan, to enhance "the public's right to receive a diversity of views and information on the airwaves," Metro Broadcasting v. FCC, 110 S. Ct. 2997, 3010 (1990), the benefits of which "redound to all members of the viewing and listening audience." Id. at 3011. Minority ownership of broadcast stations promotes diversity because "an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities." Id. at 3017. With the vast majority of the broadcast day devoted to home shopping programming, there is often little or no opportunity for a minority owner to exert his or her influence over programming in the manner Justice Brennan contemplated.

value to encouraging minority ownership without affording these owners the opportunity to control their programming. Indeed, the Communications Act requires nothing less. Yet, HSN requires licensees it bankrolls to adhere strictly to the prescribed HSN format. Failure to do so can result in the licensee being compelled to pay back its loan almost immediately under onerrous terms, or to sell the station.[10]

These business practices troubled a number of members of the House Energy and Commerce Committee, and were a substantial part of the impetus behind the adoption of the House Bill's provision denying must-carry status to stations predominantly devoted to home shopping programming. Six members of the Committee, including the sponsor of what became Section 4(g), wrote specially to reaffirm their support for the FCC's policies to license minority applicants and to express their belief that "The conversion of these [minority owned] stations makes a mockery of that policy.[11] Representatives Espy and Bustamante have condemned the

[10]For example, the affiliation agreement entered into between HSN and Urban Broadcasting Company (UBC) provides that if UBC "unreasonably" rejects any HSN programming which it considers unsuitable for its community, HSN can declare that UBC has breached the affiliation

practice of "using the [minority licensing] program to capture minority stations and turn them into mere relay stations of HSN's national feed of non-minority home shopping sales presentations and commercials." Id.

[redacted] SKC Comment at 41

these licensees appear to be held hostage to it. This usurpation of editorial control by HSN raises a substantial and material question of fact as to whether HSN is in de facto control of these stations in violation of the Communications Act. See, July 16 Petition for Reconsideration, supra.

No matter what decision the Commission ultimately makes, it should free minority broadcasters from this extended delegation of programming authority. The Commission should declare null and void and contrary to the public interest, all contractual provisions in agreements between HSN and licensees which condition financing of the station on near-absolute adherence to HSN's program schedule.

ship, so long as such licensees are ultimately required to generate programming of their own selection. Just as the Commission has in the past applied different standards to unaffiliated UHF stations, Delegation of Authority, 43 FCC2d 638 (1973), it could extend the transition period for changing programming specifically for minority owned stations, or for stations carrying programming which meets important needs which otherwise would not be met. It could also devise a definition for the statutory term "predominantly utilitized" to give special attention to blocks of long form programming addressing minority or otherwise unmet community programming needs. For example, KPST-TV suggests a definition of a home shopping station as being one that devotes more than 50% of its total broadcast hours and more than 25% of its prime time hours to home shopping programming. KPST-TV Comments at 4-6.[12]

Finally, CSC notes that the Commission has broad powers to fashion case-by-case waivers of the transition rules it may develop. Preservation of minority owenrship might well be a valid basis for extending the maximum transition period. However, the Commission should insure that any waiver policy it announces explicitly states that the objective of its rules is to migrate stations to full public interest service.

IV. THE COMMISSION MAY LIMIT COMMERCIALIZATION OF THE AIR-

is also to question the Commission's ability to implement the Children's Television Act of

A. Section 4(g) is Not Content-Based Discrimination.

In his statement in support of SKC's comments, Professor Smolla argues that

> If SKC Station's entertainment programming format were anything other than sales presentations, they would not be subject to this proceeding at all and would be eligible for must carry like every other broadcaster that meets the traditional public interest standard.

Smolla Statement at 27. Thus, he concludes that Section 4(g) "discriminate[s] based on content," and is therefore "presumptively unconstitutional." Id. at 25.

1. Just as it Can Limit Commercial Matter Under The Children's Television Act of 1990, the Commission May Limit Commercial Matter Here.

By questioning Congress' authority to enact legislation such as the 1992 Cable Act to limit overcommercialization, Professor Smolla also calls into question the constitutionality of the Children's Television Act of 1990. As does Section 4(g), the Children's Television Act permits the Commission to limit commercialization (specifically in programming designed to

case,[15] these cases all involve political, artistic and other forms of speech which are not applicable here.[16]

Professor Smolla's attempt to analogize this case with RAV v. City of St. Paul, 112 S.Ct 2538 (1992), which involved a statute prohibiting "hate speech," is similarly flawed. Smolla Statement at 31-38. However, even assuming, arguendo, as does Professor Smolla, that RAV stands for the proposition that the government may not single out one subset of unprotected or lesser protected First Amendment speech, that is not what Section 4(g) does. It does not discriminate against the content of the commercial speech itself, but restricts the amount of such programming that can be broadcast to qualify for must carry status. In that regard, it is a reasonable "time, place and manner" restriction which is constitutionally permissible.[17]

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[15]Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) is the only commercial speech cases cited among some 20 or so others. Far from supporting Professor Smolla's position, Bolger clearly recognizes the second class First Amendment status given to commercial speech. See p. 19, infra.

[16]In an outlandish comparison of commercial and purely political speech, the NIMA compares a program length commercial featuring the sale of Victoria Jackson hair products (producing sales in excess of $150 million, NIMA boasts) to "Ross Perot infomercials...which significantly helped his performance in the 1992 Presidential election." NIMA Comments at 6.

[17]Professor Smolla also claims that Section 4(g) constitutes "disparate treatment of similarly situated broadcasters" in violation of the equal protection clause. Smolla Statement at 10 n. 14. But given that broadcasters are not a "suspect class" which triggers strict or even intermo-

B. Discovery Network Does Not Expand the First Amendment Protection for Commercial Speech.

Commenters' reliance on Discovery Network represents nothing more than a desperate attempt to seize on one of the few recent Supreme Court cases which has struck down regulations on commercial speech. Nothing in that case, however, changes the standard ennunciated in cases such as Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328 (1986) and Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 473 (1989). That standard requires only that regulation of commercial speech "reasonably fit" a government objective. This test is easily met in this case. See CSC Comments at 11-14.

Discovery Network involved a local ordinance which permitted newsracks on city streets, but prohibited only those racks containing magazines consisting primarily of admittedly "core" commercial speech. This ordinance was passed under the guise that the limitation would lead to an increase in safety and an improvement in the aesthetic condition of the city. Emphasizing that its "holding...is narrow," id. at 4276, the Court struck down the ordinance because "the respondent publishers' newsracks are no greater an eyesore that the newsracks permitted to remain on Cincinnati's sidewalks." Id.

However, rather than extend First Amendment rights for commercial speech, the Court reaffirmed the validity of the "reasonable fit" test of its prior cases. Applying that standard, the Court found that the test was not met. Relying on Fox, the Court stated

> Because the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding...that the city has not established the "fit" between its goals and its chosen means that is required by our opinion in Fox.

Id.[18]

Significantly, the Court made clear that had the city "asserted an interest in preventing commercial harms by regulating the information distributed by respondent publishers' newsracks," such an ordinance would have likely passed constitutional muster. Id. Quoting Bolger at page 81, the court stated that "the commercial aspects of a message may provide a justification for regulation that is not present when the communication has no commercial character." Id.

Thus, it would be fully consistent with Discovery Network and its predecessor cases for the Commission to find that its interest in reducing the harms wrought over the public's airwaves by excessive commercialization justifies a limitation on the number of hours a broad-